

1                   UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF RHODE ISLAND  
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4                   UNITED STATES OF AMERICA                 C.R. NO. 05-98 T  
5

6                   vs.  
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9                   RICHARD HATCH                             NOVEMBER 9, 2005  
10   Providence, RI  
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12                   BEFORE MAGISTRATE JUDGE LINCOLN D. ALMOND  
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15                   APPEARANCES:

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17                   FOR THE GOVERNMENT:  
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19                   ANDREW REICH, ESQ.  
20                   LEE VILKER, ESQ.  
21                   U.S. ATTORNEY'S OFFICE  
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27                   FOR THE DEFENDANT:  
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29                   JOHN F. MacDONALD, ESQ.  
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31                   Providence, RI 02903  
32                   421-1440

1 NOVEMBER 9, 2005

2 THE COURT: Good afternoon. We're here today in  
3 United State of America vs Richard Hatch, CR No.  
4 05-98 T. We're here for argument on defendant's motion  
5 to compel production of IRS special agent's report.  
6 That motion has been referred to me for determination by  
7 Chief Judge Torres. Can the attorneys who are here  
8 today identify themselves for the record, please?

9 MR. REICH: Andrew Reich and Lee Vilker on behalf  
10 of the United States of America.

11 MR. MacDONALD: John MacDonald on behalf of  
12 Richard Hatch.

13 THE COURT: All right. I'll hear from you,  
14 Mr. MacDonald.

15 MR. MacDONALD: Thank you, your Honor. Good  
16 afternoon, your Honor.

17 THE COURT: Good afternoon, Mr. MacDonald.

18 MR. MacDONALD: I had filed a motion and  
19 memorandum of law on behalf of counsel for Mr. Hatch.  
20 Lead counsel Michael Minns was unable to attend this  
21 hearing. Co-counsel Enid Williams has been unable to  
22 attend. They have asked in their stead that I argue the  
23 motion on Mr. Hatch's behalf.

24 The basis of the motion, your Honor, is that we are  
25 compelling production of the special agent's report.

1 This is a report. It is what it says it is. It's a  
2 report from the special agent and includes a list of a  
3 number of items that we believe we feel we're entitled  
4 to. We haven't looked at the special agent's report. I  
5 can't say for certain what's in there, but based upon  
6 the experience of Mr. Minns in handling these cases,  
7 we've argued by way of memorandum what we believe would  
8 be in there, specifically any and all statements of  
9 Mr. Hatch contained in the special agent's report, and  
10 any and all exculpatory evidence, specifically  
11 exculpatory evidence in terms of the number of witnesses  
12 who were summonsed in this case, who were interviewed in  
13 this case, the fact that those witnesses may have been  
14 targets of the investigation, may have criminal  
15 liability. It goes to Brady. It goes to the  
16 exculpatory nature of the evidence.

17 Now I can't state here and tell you that there's  
18 absolutely one hundred percent statements from Mr. Hatch  
19 in there, only that generally speaking there are  
20 statements from Mr. Hatch, and we're entitled, pursuant  
21 to Rule 16, of all statements from Mr. Hatch. Again, in  
22 terms of exculpatory evidence, I can't tell you that  
23 absolutely in this report is there contained exculpatory  
24 evidence but I believe our request is narrow enough and  
25 tailored enough to compel either production of the

1 reports or to compel an in camera review by the Court.

2 Now, my brother has --

3 THE COURT: Mr. MacDonald, in any case that comes  
4 before this Court, if there's any kind of an  
5 investigative report, those investigative reports  
6 technically are protected from disclosure under Federal  
7 Criminal Procedure 16(a)(2). Any criminal defense  
8 attorney in the future, if I would agree with your  
9 position, could stand up in the future and say, I  
10 speculate that there are statements of the defendant; I  
11 speculate that there's exculpatory material; I speculate  
12 that there is whatever, that you believe is disclosable  
13 information in that report, and then that would either  
14 require compelled disclosure or in camera review by the  
15 Court in every case. As I read the cases, and in  
16 particular a recent First Circuit case in United States  
17 vs Caro-Muniz it seems to me that it places the burden  
18 on the defendant to show with some sufficient  
19 particularity to have some grounds to establish that  
20 there is information in there that the Government is  
21 withholding that should be disclosed, not simply that  
22 it's just maybe there, we think it's likely there. Some  
23 particular evidence or some particular reason why this  
24 case should be treated differently and I should order an  
25 in camera review or disclosure. Do you have anything to

1 support that argument?

2 MR. MacDONALD: Certainly, your Honor. This is a  
3 unique case. It started as a civil investigation of  
4 Mr. Hatch and it later turned into a criminal  
5 investigation. This is a unique report prepared by IRS,  
6 the special agent in this matter from the Internal  
7 Revenue Service. The Caro case, I believe, is  
8 distinguishable, your Honor, because there the 71 tapes  
9 which included hours of conversations which the  
10 defendant in that case wanted an in camera review, was  
11 clearly a burdensome request. Here we're dealing with a  
12 file from a special agent that the Court can quickly  
13 review and determine whether or not there is  
14 discoverable statements from Mr. Hatch, whether or not  
15 there's evidence of an exculpatory nature. The  
16 Government has indicated that there's not, and that  
17 indication from the Government would simply be confirmed  
18 by the Court. We believe in this instance that we're  
19 entitled to it and we ask the Court to order it.

20 THE COURT: Thank you, Mr. MacDonald. Mr. Reich.

21 MR. REICH: Your Honor, although Mr. MacDonald  
22 states that this is a unique case and this is a unique  
23 report, there's no way in which he distinguished the  
24 uniqueness of this case or the uniqueness of this report  
25 from, as this Court observed, any other case where

1 defense counsel could come in and say they want to see  
2 the report that was prepared by the agent who  
3 investigated the case. The Government is well aware of  
4 its obligations under Rule 16, of its obligation to  
5 provide all exculpatory evidence to the defense, and  
6 also is well aware of this Court's discovery order that  
7 it issued at the time of arrangement, and we have  
8 complied with all of those orders and all of those  
9 obligations. In fact, we have provided over 4,000 pages  
10 of documents to the defendant pursuant to our  
11 obligations.

12 The report in question is an agent's report. It's  
13 the special agent's report from the IRS. It's a report  
14 that details the results of his investigation. It's a  
15 report that is initially reviewed by the IRS. It's a  
16 report that is submitted to the tax division for their  
17 review, and it's ultimately submitted to the United  
18 States Attorney's Office, and we use it as the basis for  
19 deciding what charges to submit to the grand jury for  
20 its consideration.

21 Mr. MacDonald openly acknowledged that basically he  
22 is purely speculating when he says that he believes the  
23 report may contain exculpatory information. The report,  
24 in fact, does not contain any exculpatory information.  
25 We have provided the over 4,000 documents that we

1 already discussed. In his motion he states that the  
2 report has statements of Mr. Hatch. The report does not  
3 have statements of Mr. Hatch. And, indeed, we don't  
4 really feel as though we even need to respond with  
5 particularity as to what --

6 THE COURT: Mr. Reich, have you reviewed that  
7 file personally?

8 MR. REICH: Yes, I have, your Honor.

9 THE COURT: All right.

10 MR. REICH: I have, your Honor. And I can tell  
11 you there are no statements of Mr. Hatch in that report,  
12 and I can tell you that all exculpatory information has  
13 already been provided to the defense.

14 It's clear that this motion is purely a fishing  
15 expedition to try to allow for the defense to attempt to  
16 look at documents which they're clearly not entitled to  
17 under Rule 16. As this Court observed, Rule 16(a)(2)  
18 specifically exempts these types of reports from the  
19 disclosure rules unless the reports otherwise fall  
20 within the disclosure rule requirements of Rule 16, such  
21 as if it contains a statement of the defendant or  
22 exculpatory information. And the First Circuit, and  
23 other circuits, clearly place the obligation to  
24 determine whether the Government's reports contain  
25 exculpatory information on the Government, and we have

1 met that obligation in this particular case, your Honor.

2       The First Circuit case, the Caro-Muniz case,  
3 specifically talks about the fact that the burden is on  
4 the Government to look through its files to determine  
5 whether or not its files contain exculpatory  
6 information, that it does not give a right to the  
7 defendant to go through the files to make that  
8 determination, and also that it's not necessary for the  
9 Court to conduct an in camera review to make that  
10 determination. And, indeed, other circuits have  
11 followed that same reasoning.

12       In our brief we cited the United States vs Michaels  
13 case, which is a Ninth Circuit case in which the Court  
14 stated, and I quote, "The appellant's mere speculation  
15 about materials in the Government's files does not  
16 require the district court, or this Court, under Brady,  
17 to make the materials available for the appellant's  
18 inspection, nor does Brady require the trial court to  
19 make an in camera search of the Government files for  
20 evidence favorable to the accused." We also cited a  
21 Fourth Circuit case, United States vs Holmes, which held  
22 the same way. And I've already specifically talked  
23 about Rule 16(a)(2) which specifically exempts this type  
24 of report, and we agree, and we believe, that it would  
25 indeed establish a very bad precedent for the Government

1 to be required to turn over a report like this based on  
2 nothing more than mere speculation on the part of  
3 defense counsel that the report may contain statements  
4 of the defendant or may contain exculpatory information.

5 Thank you, your Honor.

6 THE COURT: Anything further, Mr. MacDonald?

7 MR. MacDONALD: No, your Honor. Thank you.

8 THE COURT: All right. I've reviewed the cases  
9 cited by both parties in their memos. Based primarily  
10 on Federal Rules of Criminal Procedure 16(a)(2) as well  
11 as the recent First Circuit decision in the case United  
12 States vs Caro-Muniz, I find the defendant has not made  
13 a sufficiently particularized showing to warrant the  
14 extraordinary measure of either disclosure of the  
15 special agent's file or the extraordinary measure of in  
16 camera review by the Court. Thus, for those reasons,  
17 I'm going to deny defendant's motion to compel  
18 production of the IRS's special agent's report. Is  
19 there anything further we need to deal with today?

20 Mr. Reich?

21 MR. REICH: No, your Honor.

22 MR. MacDONALD: No, your Honor. Thank you.

23 THE COURT: The Court will stand in recess.

24 (RECESS)

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3                   **C E R T I F I C A T I O N**  
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6       I, court approved transcriber, certify that the  
7       foregoing is a correct transcript from the official  
8       electronic sound recording of the proceedings in the  
9       above-entitled matter.

10  
11       /s/JOSEPH A. FONTES/  
12       COURT REPORTER  
13       AUGUST 3, 2009  
14       DATE  
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